92-1276

NO. ____

Supreme Court, U.S.
FILED
JAN 29 1993
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

CHARLES J. REICH v. MARCUS E. COLLINS and THE GEORGIA DEPARTMENT OF REVENUE

Petition for Writ of Certiorari to the Supreme Court of Georgia

# PETITION FOR WRIT OF CERTIORARI

Carlton M. Henson
Counsel of Record

McAlpin, Henson & Kearns
Eleven Piedmont Cnt., Ste. 400
3495 Piedmont Road
Atlanta, GA 30305
(404) 239-0774

## QUESTION PRESENTED

The question presented is whether a state violates the Due Process Clause when it collects taxes from its citizens in violation of the U.S. Constitution, provides its citizens a right to refunds for the unconstitutional taxation, and then eliminates the right to refunds after the time has run for any other relief.

## PARTIES

The parties to this proceeding are the Petitioner, Charles J. Reich, and the Respondents, Marcus C. Collins, Sr. (Georgia Revenue Commissioner) and the Georgia Department of Revenue.

## TABLE OF CONTENTS

Question Presented . . . . . i

Parties . . . . . ii

Table of Authorities . . . . . v

Opinions Below . . . . . 2

Jurisdiction . . . . . 2

Statement . . . . . 4

Reasons for Granting the Petition . . . . . 7

Conclusion . . . . . 15

Appendix A - Opinion of Supreme Court of Georgia - November 19, 1992 . . . . . 1A

Appendix B - Order of Supreme Court of Georgia Denying Motions for Reconsideration - December 17, 1992 . . . . 1B

Appendix C - Order of the Superior Court
of Clayton County, Georgia -
December 10, 1991 . . . . . 1C

Appendix D - Appellant's Motion for
Reconsideration - December 17, 1992 . . . . 1D

Appendix E - (O.C.G.A. § 48-2-35
(Georgia refund statute)) . . . . . 1E

Appendix F - Order of the Superior Court
of Fulton County, Georgia - March 27, 1990 1F

## TABLE OF AUTHORITIES

*James B. Beam Distilling Co. v. Georgia,*
501 U.S. ___, 111 S.Ct. 2439 (1991) . . . . . 13, 14

*Brinkerhoff-Faris Trust & Savings Co. v. Hill,*
281 U.S. 673, 682, 50 S.Ct. 451, 454 (1930) . . . . . 13

*Chevron Oil v. Huson,*
404 U.S. 97, 92 S.Ct. 349 (1971) . . . . . 5

*Davis v. Michigan Department of Treasury,*
489 U.S. 803, 109 S.Ct. 1500 (1989) . . . . 4, 5, 6, 7, 9

*Henderson v. Carter,*
229 Ga. 876, 195 S.E.2d 4 (1972) . . . . . 10

*Logan v. Zimmerman Brush Co.,*
455 U.S. 422, 102 S.Ct. 1148 (1982) . . . . . 14

*McKesson Corp. v. Division of Alcoholic Beverages & Tobacco,*
496 U.S. 18, 110 S.Ct. 2238 (1990) . . . . . 8, 10, 11

*United States v. Mississippi Tax Comm'n.,*
412 U.S. 363, 368, 93 S.Ct. 2183, 2187 (1973) . . . . 11

*Waldron v. Collins*,
259 Ga. 582, 385 S.E.2d 74 (1989) . . . . . 4, 9

*Waldron v. Collins*,
788 F.2d 736 (11th Cir. 1986) . . . . . 9

*Wright v. Forester*,
192 Ga. 864, 16 S.E.2d 873 (1941) . . . . . 10, 12

NO.: _____

THE SUPREME COURT OF THE UNITED STATES

October Term 1992

CHARLES J. REICH, PETITIONER, V.
MARCUS E. COLLINS and THE GEORGIA
DEPARTMENT OF REVENUE, RESPONDENTS

On Petition for Writ of Certiorari to
the Supreme Court of Georgia

**PETITION FOR WRIT OF CERTIORARI**

Charles J. Reich hereby petitions this Court for a Writ of Certiorari to the Supreme Court of Georgia.

## OPINIONS BELOW

The November 19, 1992 opinion of the Supreme Court of Georgia (App. A) is reported at ___ Ga. ___, ___ S.E.2d ___ (1992). That court's order denying Petitioner's and Respondents' motions for reconsideration (App. B) is reported at ___ Ga. ___, ___ S.E.2d ____ (1992). The decision of the trial court (App. C) is unpublished.

## JURISDICTION

The decision of the Supreme Court of Georgia was entered on November 19, 1992. Petitioner's Motion for Reconsideration (App. D) was denied by order of December 17, 1992. This petition is filed within the time allowed by law. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS AND STATUTES

Amendment 14, Section 1

. . .

[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4 U.S.C. § 111

The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

O.C.G.A § 48-2-35(a)[1]

A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state, whether paid voluntarily or involuntarily, and shall be refunded interest on the amount of the taxes or fees at the rate of 9 percent per annum from the date of payment of the tax or fee to the commissioner.

[1]Full text of O.C.G.A § 48-2-35 is Appendix E.

## STATEMENT

Before its repeal in September 1989, former O.C.G.A. § 48-7-27 exempted from state income taxation retirement benefits paid to state retirees while offering no exemptions for federal retirement benefits. Following this Court's March 1989 decision in *Davis v. Michigan Department of Treasury*, 489 U.S. 803, 109 S.Ct. 1500 (1989), Petitioner, a retired lieutenant colonel from the U.S. Army, followed established Georgia law and filed claims for tax refunds for 1985 through 1988 under Georgia's refund statute, O.C.G.A § 48-2-35. More than 25,000 other Georgia retirees also filed refund claims after *Davis*. Because the refund statute required Petitioner to wait one year from the filing of the claim to file suit, Petitioner and two other retirees joined together and also filed an equitable action for refunds in state court.

Later that year, in another equitable action brought by other retirees, the Georgia Supreme Court held that, "the refund statute (O.C.G.A § 48-2-35) provides an adequate remedy" for refunds sought in the wake of *Davis*. *Waldron v. Collins*, 259 Ga. 582, 583, fn. 1 (1989).

After that decision, the suit brought by Petitioner and others was dismissed by the trial court because the plaintiffs had not followed the procedural requirements

of the refund statute. *Salter, Reich and Neal v. Georgia, et. al.*, Sup. Ct. Fulton Co., Ga., File No. D-71448 (Order of Mar. 27, 1990, App. F).[2]

After this dismissal, and once Petitioner became eligible under the statute to file suit, he initiated this action challenging Georgia's former tax scheme and seeking refunds of illegally collected taxes. The trial court found that Georgia's scheme was unconstitutional and illegal under *Davis*, but held that *Davis* could not be applied retroactively based on *Chevron Oil v. Huson*, 404 U.S. 97, 92 S.Ct. 349 (1971).

In the decision below (App. A), the Supreme Court of Georgia acknowledged that Georgia's income tax scheme violated 4 U.S.C. § 111 and intergovernmental immunity pursuant to *Davis*. The Georgia Supreme Court also reversed the trial court and held that *Davis* must be applied retroactively.

Contrary to existing Georgia authority, however, the Georgia Court held that Georgia's refund statute does not apply to an unconstitutional or invalid tax and denied Petitioner a refund under that statute. The Court further held, without authority, that a taxpayer must have made a demand for refund at the time the tax was

---

[2]This order is not part of the record below because it was irrelevant to Petitioner's refund claims until the Ga. S. Ct. sua sponte ruled that the refund statute did not apply to his claims. Respondents did not propose the rationale adopted and did not argue that the refund statute did not apply.

paid in order to recover an unconstitutional or illegal tax.

This decision marked a clear break with existing Georgia law. Established Georgia case law held that the refund statute was applicable to unconstitutional taxes. The plain language of the refund statute mandates the refund of all taxes "illegally assessed and collected." Moreover, after *Davis*, State Revenue officials instructed taxpayers how to file refund claims.

The Due Process Clause question sought to be reviewed by this Petition was not created until the November 19, 1992 decision of the Supreme Court of Georgia. In accordance with the Rules of the Supreme Court of Georgia, Petitioner timely filed a Motion for Reconsideration alleging that the decision "violates fundamental due process." (App. Motion for Reconsideration, p. 1) (App. D). Appellant's Motion for Reconsideration was denied without opinion by Order of the Supreme Court of Georgia of December 17, 1992. (App. B).

## REASONS FOR ALLOWING THE WRIT

Words cannot do justice to the injustice of this case. Petitioner spent a lifetime respecting and upholding the law. He served 20 years in the United States Army, including a tour in Vietnam where he believed he was fighting for democratic principles, including the rule of law. In the twilight of his retirement, he is now told by the Georgia Supreme Court that the law is meaningless when the interests of the State are involved.

This case presents the question of whether a state may collect taxes in violation of the Constitution and 4 U.S.C. § 111, provide its citizens a right to refunds for the illegal taxation, and then eliminate the right to refunds after the time has run for any other relief.

This case will affect more than 25,000 retirees in Georgia alone, and there are also at least six other *Davis* related cases filed with the Court. These cases largely raise the issue of retroactivity and relate to the remedy only as a secondary issue. Without definitive guidance from this Court, those states and others where *Davis* litigation is pending will struggle with the due process issues as it relates to remedies.

Courts in Georgia and South Carolina have already demonstrated the lengths to which they will go to destroy any remedy for retirees. Allowing the

decision below to stand would give states a free hand to impose discriminatory taxes because states will know the only risk they face is repeal of the offending statute.

## I. GEORGIA HAS NOT PROVIDED ITS FEDERAL RETIREES A CLEAR AND CERTAIN REMEDY FOR UNCONSTITUTIONAL TAXATION.

In *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco,* 496 U.S. 18, 110 S.Ct. 2238 (1990), this Court held that "[b]ecause exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause." 496 U.S. at 27, 110 S.Ct. at 2250. This court further held that the remedy provided must be "clear and certain." 496 U.S. at 32, 110 S.Ct. at 2248.

Georgia has failed to provide its federal retirees a clear and certain remedy for the discriminatory income taxes they have paid. Although the Georgia Supreme Court has proposed a new remedy (pay under protest), and the Respondents will offer up other remedies that were theoretically available, Georgia purported to provide its retirees with a remedy that was so clear and certain that more than 25,000 retirees pursued this remedy to the exclusion of all others. Petitioner and

other retirees followed the clear language of the refund statute, clearly established precedent, and directions of state officials in filing refund claims under the refund statute. Three years later, they are told the statute does not even apply.

Well before this Court decided *Davis*, in 1985 a group of Georgia federal retirees challenged the legality of the disparate tax treatment of state retirees and federal retirees under Georgia's income tax. Seeking class action certification in federal court, the plaintiffs argued that the Tax Injunction Act (28 U.S.C. § 1341) did not preclude federal jurisdiction. Accepting the arguments of the State of Georgia, the Eleventh Circuit concluded that Georgia taxpayers could bring an action for refunds pursuant to O.C.G.A § 48-2-35, and that Georgia law provided a plain, speedy and efficient remedy. *Waldron v. Collins,* 788 F.2d 736 (11th Cir. 1986).

Further, at least two other courts have held that Georgia's refund statute was an available remedy for the specific type of claims asserted by Petitioner. *See*, *Wetzel v. Collins,* 11th Cir. Case No. 90-9023, Judgment Order, September 19, 1991, affirming order of September 26, 1990, by Hon. Orinda D. Evans, U.S.D.C., No. Dist. Ga., Case No. 1:89-CV-758, and *Waldron v. Collins,* 259 Ga. 582 (1989).

Additionally, the Georgia Supreme Court has previously held that the refund statute applies to claims for refunds of unconstitutional taxes. *See e.g.*, *Henderson v. Carter*, 229 Ga. 876, 195 S.E.2d 4 (1972) (constitutional challenge to sales tax dismissed because taxpayers failed to follow procedures of refund statute); *Wright v. Forester*, 192 Ga. 864, 16 S.E.2d 873 (1941) (refund statute, not mandamus, is proper procedure for recovery of tax alleged to be unconstitutional). In fact, no Georgia court prior to the instant case had ever denied refunds under the state refund statute for the reason that the taxpayer could have contested the tax without paying it first.

Regardless of the merit of any other remedy, the purported availability and attractiveness of the refund statute makes Georgia's entire remedial scheme unclear and uncertain. For, if the refund statute is inapplicable as the Georgia Supreme Court has now held, Georgia retirees were required to play remedy roulette. Retirees were required to choose from several apparent remedies. If they placed their bets on the "wrong" remedy, they lost the gamble, the illegal tax and any right to a refund.

Even if Georgia offered other remedies that satisfied Due Process, the overall scheme was unclear and uncertain because of the apparent availability of the refund statute. Thus, the clear and certain mandate of *McKesson* is not met by Georgia law.

Furthermore, not only does the overall scheme fail due process, the individual remedies proposed by the Respondents and by the Georgia Supreme Court do not pass muster under the Due Process Clause. The Respondents have previously argued that Petitioner could have refused to pay the tax, awaited an assessment by the State, and then raised the illegality of the tax in defense to an action initiated by the State. There are several due process problems, though, with this procedure. First, the taxpayer is subject to a penalty equal to 25% of the tax due[3] as well as interest at the rate of 12% per annum.[4] As this Court noted in *McKesson*, "We have long held that, when a tax is paid in order to avoid financial sanctions or a seizure of real personal property, the tax is paid 'under duress' in the sense that the State has not provided a fair and meaningful deprivation procedure." 496 U.S. at 30, 110 S.Ct. at 2251, fn. 21, citing *United States v. Mississippi Tax Comm'n.*, 412 U.S. 363, 368, 93 S.Ct. 2183, 2187 (1973). A penalty of 25% is a significant financial sanction for retirees living on pensions.

Additionally, the assessment procedure is wholly within the discretion of the Revenue Commissioner.[5]

---

[3]O.C.G.A. § 48-7-86.

[4]O.C.G.A. § 48-2-40.

[5]O.C.G.A. § 48-2-46.

The State has available additional remedies of levy, garnishment, and attachment.[6] Significantly, the taxpayer is also subject to criminal prosecution.[7] None of these remedies available to the State are automatically precluded by a protest. Indeed, in *Wright v. Forester*, 192 Ga. 864, 16 S.E.2d 873 (1941), the taxpayer challenged a tax as unconstitutional but was persuaded to pay the tax by threats of penalties and criminal prosecution.

For retirees, the "stick" of these sanctions is onerous, particularly when contrasted with the "carrot" of the apparent availability of a refund remedy that includes interest at 9%. This explains why retirees filed 86,000 claims for refunds.

Additionally, the remedy enacted by the Georgia Supreme Court, pay under protest, was not clear and certain before November 1993 because it was unknown before then. The Georgia court cites no statutory or case authority for its new law. While there are old Georgia cases that require protest to prevent a payment from being deemed "voluntary," these authorities were overruled by the refund statute which expressly mandates refunds of illegal taxes "whether paid voluntarily or involuntarily."

---

[6]O.C.G.A. § 48-2-55.

[7]O.C.G.A. § 48-7-2.

Indeed, until the Georgia Supreme Court's recent enactment, even the State itself did not believe a protest was necessary. *James B. Beam Distilling Co. v. Georgia,* 501 U.S. ___, 111 S.Ct. 2439 (1991) was another case in which a Georgia taxpayer sought refunds of unconstitutionally collected taxes. In oral argument the State represented to this Court that, "there is no requirement for protest in Georgia. The refund statute does not require a protest." (Official Transcript, October 30, 1990, p. 31).

As this Court held in *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 682, 50 S.Ct. 451, 454 (1930), "[a] state may not deprive a person of all existing remedies for the enforcement of a right" unless there is "afforded to him some real opportunity to protect it." The Georgia Supreme Court has in fact deprived Petitioner of all remedies. It has enacted legislation repealing the refund statute and creating a new remedy that is and was unavailable to Petitioner.

In summary, Georgia's individual remedies do not satisfy Due Process. The predeprivation remedies expose a taxpayer to financial and criminal sanctions, while the pay under protest remedy was only created in November, 1992. Even if any of these remedies were somehow found to satisfy Due Process, the overall scheme was unclear and uncertain because of the apparent availability of a refund procedure.

## II. THE GEORGIA SUPREME COURT DEPRIVED PETITIONER OF HIS PROPERTY RIGHTS WITHOUT DUE PROCESS.

The State of Georgia was under no obligation to adopt a statutory refund procedure. It could have adhered to its common law rule that required payment under compulsion, duress or protest in order to obtain a refund. Instead, it followed the federal model and provided for refunds of voluntarily paid taxes upon compliance with certain requirements. Case law established that this procedure was applicable to unconstitutional taxes. The right of a taxpayer to the use of this procedure is a species of property protected by the Due Process Clause. *Cf., Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982) (protectable property interest held to exist in fair employment procedure created by state statute).

The Georgia Supreme Court's refusal to award refunds arbitrarily deprives Petitioner of the property interest created by the statute and these cases. The rationale offered by the Court has little to do with Petitioner or other retirees. The reference to a tax passed on to the consumer (p. 9A, infra) ignores the facts of this case. This reference makes sense only in the context of the *Beam* case which is still pending two years after this Court's remand.

The Court does not find that the refund statute is illegal or unconstitutional. The Court does not even address its earlier decisions. Rather, the Court tortures the plain language of the statute to conclude the statute doesn't apply, and its decision deprives Petitioner of a property right under Georgia law without notice or a meaningful opportunity to be heard.

## CONCLUSION

For the reasons set forth above, Petitioner requests that this petition for certiorari be granted.

Respectfully submitted,

Carlton M. Henson
Counsel of Record

McALPIN, HENSON & KEARNS
Eleven Piedmont Ctr., Ste. 400
3495 Piedmont Road, N.E.
Atlanta, Georgia 30305
(404) 239-0774

## APPENDIX A

IN THE SUPREME COURT OF GEORGIA

---

Decided: November 19, 1992

S92A0621: REICH V. COLLINS, ET. AL.

S92A0622: REICH V. COLLINS, ET. AL.

CLARKE, Chief Justice

We granted the appellant's application to appeal, OCGA § 5-6-35(a), to consider the issue of his entitlement to a refund of state income taxes paid on his federal military retirement benefits in view of the United States Supreme Court's decision in *Davis v. Michigan,* 489 U.S. 803 (109 SC 1500, 103 LE2d 891) (1989).

Former OCGA § 48-7-27 created an income tax exemption for retirement benefits paid by the State of Georgia to retired state employees. No such exemption existed for retirement benefits paid by the federal government to retired federal employees residing in

Georgia. In *Davis v. Michigan,* supra, the United States Supreme Court held that Michigan's taxing scheme, which exempted from state income taxation all state retirement benefits, but taxed all federal retirement benefits, violated the constitutional principles of intergovernmental tax immunity, as well as 4 U.S.C. § 111.[1] Because the state of Michigan conceded that a refund would be due the taxpayer if the Court found its taxing scheme to be unconstitutional, it was not necessary for the Court to determine the merits of the taxpayer's claim for a refund. The case was remanded to the Michigan courts to comply with the Court's "mandate of equal treatment," *Davis*, 489 U.S. at 818, in determining whether the taxpayer was entitled to prospective relief from discriminatory taxation.

Following the decision in *Davis v. Michigan,* the Georgia legislature, in special session, repealed that portion of OCGA § 48-7-27 which granted retired state employees an exemption from income taxation on their retirement benefits. Shortly thereafter, appellant, a retired colonel in the United States Army, filed a claim with the appellee Department of Revenue for a refund of income taxes he had paid to the State of Georgia on

---

[1]This code section permits the States to tax "pay or compensation for personal services as [a federal] officer or employee. . . if the taxation does not discriminate against the employee because of the source of the pay or compensation."

his military retirement benefits. The Department denied his claim, and appellant brought this action pursuant to OCGA § 48-2-35.

The case came before the trial court on cross-motions for summary judgment. The trial court concluded that former OCGA § 47-7-27 violated the principles of *Davis v. Michigan,* supra, and partially granted the appellant's motion for summary judgment on this issue. However, after analyzing the case under *Chevron Oil v. Huson,* 404 US 97 (92 SC 349, 30 LE2d 296) (1971), the trial court held that *Davis v. Michigan* should not be applied retrospectively. The trial court therefore concluded that the appellant was not entitled to a refund, and granted the appellee's motion for summary judgment in this regard.

The appellant concedes that if this court determines that he is entitled to a refund, he will be eligible only for the taxable years 1985 through 1988.

1. We agree with the trial court that the principles of *Davis v. Michigan* apply to this case.[2] However, we have determined that, with regard to the issue of retroactive application, the case must be analyzed under *James B. Beam v. Georgia,* 501 U.S. ___ (111 SC 2439, 115 LE2d 481) (1991), rather than the test set out in *Chevron Oil,* supra.

---

[2]We note that the State did not appeal this ruling by the trial court.

In *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (104 SC 3049, 82 LE2d 200 (1984), the U.S. Supreme Court held that Hawaii's taxing scheme, which distinguished between imported and locally distilled alcohol products, violated the Commerce Clause. Following this decision, James B. Beam Distilling Company filed a suit for refund of taxes it had paid to the State of Georgia, claiming entitlement to the refund under *Bacchus*. In *James B. Beam v. State of Georgia*, 259 Ga. 363 (382 SE2d 95) (1989), this court recognized that Georgia's taxing scheme, which imposed a higher tax on alcoholic beverages imported into the state than on alcohol produced in this state, violated the principles of *Bacchus*, supra. However, analyzing the case under *Chevron Oil*, supra, we held that the trial court did not err in applying the *Bacchus* decision prospectively only. The U.S. Supreme Court granted certiorari to our decision in *Beam* and reversed, holding that *Bacchus* should have been applied retroactively to our decision in *Beam*.

The U.S. Supreme Court held that where, in a civil case such as *Bacchus*, it does not reserve the question of whether the holding should be applied retroactively, the decision "is properly understood to have followed the normal rule of retroactive application in a civil case," 115 LE2d. at 490, and thus the decision is to be applied not only to the parties before it, but "to

all others by and against whom claims may be pressed, consistent with res judicata and procedural barriers such as statutes of limitation." *Id.* at 488. The Court held that it is error for a lower court to refuse to apply a rule of federal law retroactively after the case announcing it has already done so. *Id.* at 491. The Court went on to distinguish between the issue of retroactivity where a federal law or constitutional question is raised, and the issue of remedies, "i.e., whether the party prevailing under a new rule should obtain the same relief that would have been awarded if the rule had been an old one." *Id.* at 487. In the normal circumstance, the issue of retrospectivity, or choice of law, is a federal question, while the remedial inquiry is left to the states. *Id.* at 488. The Court stated, as a general guideline, that when it remands a case to a lower court for consideration of any remedial issues, this "necessarily implies" that the choice of law, or retroactivity, question has been decided, and that the Court will apply its decision not only to the parties before it, but retrospectively to all others not procedurally barred. *Id.* at 490-491.[3]

The State's argument in the case before us is that because it cannot be determined from the Court's

---

[3]The Court held in *Beam* that principles of "equality and stare decisis" prevail over the *Chevron Oil* analysis, *Beam*, 115 LE2d at 491, and that the need to ensure that the substantive law "will not shift and spring," *Id.* at 493, limits the "possible applications of *Chevron Oil*." *Id.*

opinion in *Davis v. Michigan* that the case was remanded for consideration of remedial issues since Michigan had conceded that a refund was due the taxpayer, it cannot be concluded that the Supreme Court intended retroactive application of the *Davis* decision. We do not agree.

As we read *Davis v. Michigan*, the Court applied its decision to the taxpayer before it. The State of Michigan conceded that if the Court found its taxing scheme to be unconstitutional, then, under state law, the taxpayer would be entitled to a refund. Once the Supreme Court determined that Michigan's taxing scheme was unconstitutional and applied that principle to the taxpayer, Michigan conceded that the taxpayer was entitled to a refund. It does not follow that if the Supreme Court had determined that its decision in *Davis* was to be prospective only,[4] and thus not applicable to the litigants before it, that the state of

---

[4]See *Beam*, 115 LE2d at 488 for a discussion of prospective application of court decisions. Under the Court's analysis, the prospective method of overruling cases does not apply the new rule to the parties in the case, but only uses the case as a vehicle for announcing a new rule of law. The principle of selective prospectivity, in which the new rule is applied to the litigants before the court, has been abandoned in the criminal context, see *Griffith v. Kentucky*, 479 U.S. 314 (107 SC 708, 93 LE2d 649) (1987), and "appears never to have been endorsed [by the Court] in the civil context." *Beam*, 115 LE2d at 490.

Michigan would have conceded the taxpayer was due a refund.

Further, the issue of whether *Davis v. Michigan* is to be applied retroactively is foreclosed by the Supreme Court's decision in *Barker v. Kansas*, ___ U.S. ___ (112 SC 1619, ___ LE2d ___) (1992). In that case military retirees challenged the Kansas income taxation scheme which permitted taxation of federal retirement benefits while exempting from taxation state retirement benefits. The U.S. Supreme Court held that this case was controlled by *Davis v. Michigan*. The Court reversed and remanded to the lower court for a determination of the remaining issues, including the taxpayers' entitlement to refunds of taxes previously paid. As such, it is clear that the Court applied the decision of *Michigan v. Davis* retroactively to the litigants in *Barker*, just as the Court applied the *Bacchus* decision retroactively to the litigants in *James Beam*.[5]

---

[5]We further note that the Virginia Supreme Court analyzed an identical tax issue under the principles of *Chevron Oil*, and determined that *Davis v. Michigan* is not to be applied retroactively. *Harper v. Virginia Dept. of Taxation*, 401 SE2d 868 (Va. 1991). The U.S. Supreme Court granted certiorari as to this decision, vacated the judgment of the Virginia Supreme Court, and remanded for consideration in light of its decision in *James Beam*. 59 USLW 3863 (July 2, 1991). On remand the Virginia Supreme Court concluded that *James Beam* does not require retroactive application of *Davis v. Michigan*. 410 SE2d 629 (1991). On May 18, 1992, the U.S. Supreme Court granted certiorari to that decision. 60 USLW 3779.

We thus conclude that the trial court correctly held that OCGA § 47-7-27 violated the principles of *Davis v. Michigan*, but erred in holding that this case does not apply retroactively.

2. The issue of what remedy is to be afforded the appellant remains. This is a question of state law. *Beam*, supra, 115 LE2d at 488. As the Supreme Court stated in *Beam*, nothing deprives the State of its "opportunity to raise procedural bars to recovery under state law or demonstrate reliance interests entitled to consideration in determining the nature of the remedy that must be provided. . ." *Beam*, 115 LE2d at 494.

OCGA § 48-2-35(a) provides, in part, that "a taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state, whether paid voluntarily or involuntarily . . ." (Emphasis supplied.) We hold that this statute contemplates the situation where a taxing authority erroneously or illegally assessed and collects a tax under a valid law. It does not address the situation where the law under which the taxes are assessed and collected is itself subsequently declared to be unconstitutional or otherwise invalid. This distinction is significant in that the State must be able to rely on the laws under which it assesses taxes in order to promote stable and efficient government. Furthermore, this protects the State against

those instances in which a vendor/taxpayer has recouped its tax expense by passing it on to the consumer. See, e.g., *Atlanta Americana Motor Hotel Corp. v. Undercofler*, 222 Ga. 295(1) (149 SE2d 691) (1966); *Blackmon v. Ga. Ind. Oilmen's Assn.*, 129 Ga. App. 169 (198 SE2d 900) (1973). Were we to interpret the statute differently, the vendor/taxpayer would realize a windfall or double recovery not intended by the legislature.

Thus we conclude that the taxpayer is not entitled to a refund under the provisions of OCGA § 48-2-35(a).

We that this opportunity to hold that in cases in which a taxing statute is declared unconstitutional or otherwise void, a taxpayer must have made a demand for refund at the time the tax is paid or at the time his tax return is filed, whichever occurs last. Failure to do so bars any future claim.

Judgment affirmed in part and reversed in part. Hunt, Benham, and Fletcher, JJ., concur; Sears-Collins, J., concurs in judgment only; Bell, P.J., disqualified.

## APPENDIX B

IN THE SUPREME COURT OF GEORGIA

December 17, 1992

The Honorable Supreme Court met pursuant to adjournment. The following Order was passed:

CHARLES J. REICH V. MARCUS E. COLLINS, SR., COMR., ET. AL.

Upon consideration of the Motions for Reconsideration filed in these cases, it is ordered that they be hereby denied. All the Justices concur, except Bell, P.J., disqualified, and Hunstein, J., not participating.

**APPENDIX C**

IN THE SUPERIOR COURT OF CLAYTON COUNTY
STATE OF GEORGIA

| | | |
|---|---|---|
| CHARLES J. REICH, | ) | |
| | ) | |
| *Plaintiff,* | ) | CIVIL ACTION FILE |
| | ) | NO.: 90-cv-18388-4 |
| v. | ) | |
| | ) | FILED: Dec. 11, 1991 |
| MARCUS E. COLLINS, SR., | ) | |
| Individually and in his | ) | |
| capacity as Georgia State | ) | |
| Revenue Commissioner, and the | ) | |
| GEORGIA DEPT. OF REVENUE, | ) | |
| | ) | |
| *Defendants.* | ) | |
| | ) | |

**ORDER**

FACTS:

This action was filed April 19, 1990, as a complaint for refund of income taxes paid on military

retirement income during the years 1980 through 1988. Under a previous Georgia law, Section 48-7-27, O.C.G.A., repealed in 1989, retirement income from state government was exempted from income taxation while retirement income from the federal government was not. In *Davis v. Michigan Department of the Treasury,* 489 U.S. 803 (1989), the United States Supreme Court struck down a similar Michigan law both on constitutional grounds and because it violated 4 U.S.C. Section 111. The Plaintiff contends that taxes collected on his military retirement benefits during the years of 1980 through 1988 must be refunded to him in light of this decision. Defendants Marcus E. Collins and the Georgia Department of Revenue have filed a Motion for Summary Judgment on several grounds. The Plaintiff has also moved this Court to grant his Motion for Summary Judgment. These Motions for Summary Judgment were argued on October 18, 1991.

ISSUES PRESENTED:

I. Whether under Georgia law the statute of limitations will permit the Plaintiff's claim?

II. Whether Georgia's income tax treatment was not violative of the principles of *Davis*?

III. Whether *Davis* should be applied retroactively?

DISCUSSION:

I. Whether under Georgia law the statute of limitations will limit the Plaintiff's claim?

Section 48-2-35(b)(1), O.C.G.A., provides that a claim for the refund of a tax illegally assessed and collected may be made anytime within three (3) years after the date of the payment to the commissioner. Because the statute is a waiver by the State of its sovereign immunity, it must be strictly enforced. *Ingalls Iron Works Company v. Blackmon,* 133 Ga. App. 164 (1974). This statute of limitations applies even where the refund is based in part on federal law. *McKesson v. Division of Alcoholic Beverages and Tobacco,* 58 U.S.L.W. 4665 (U.S. June 4, 1990); *Michael v. Louisiana,* 350 U.S. 91 (1955). In the case de jure the Plaintiff contends that the three-year statute of limitation codified in O.C.G.A., 48-2-35, should not apply to those taxes collected under an unconstitutional statute, citing the Georgia Supreme Court's reasoning in *James B. Beam Distilling Co. v. Georgia,* 259 Ga. 363, 382 S.E. 2d 95 (1989). The Georgia Supreme Court in *Beam* merely defines the authority which was conferred upon the courts to determine retroactivity of its decision under O.C.G.A., 48-2-35. *Beam* does not, as the Plaintiff argues, reject the basic tenets of O.C.G.A., 48-2-35, as it

applies to taxes assessed under an unconstitutional statute. Therefore, because the Plaintiff's claims were filed in April of 1989, and the statute of limitations does not apply, the Plaintiff could get no refund for taxes paid in 1980 through 1984.

II. Whether Georgia's income tax treatment was not violative of the principles of *Davis*?.

The Defendants argue that the repealed Georgia statute must be sustained if it bore a reasonable relation to a legitimate state purpose. *Exxon Corporation v. Eagerton,* 462 U.S. 176 (1983). They point out that the preferential income tax treatment given to state retirees is designed to enable the State to hire better employees.

Federal law, however, expressly prohibits state taxation plans which discriminate against federal employees based solely on the source of the pay or compensation. 4 U.S.C., Section 111 (1939). The court in the *Davis* case found that Michigan's discriminatory tax scheme, which was almost identical to Georgia's, violated this statute. In *Davis*, Michigan was not able to demonstrate "significant differences" between federal civil service retirement income and the state retirement income exempted from taxation.

The Defendants before this Court contend that there are significant differences between military

retirement pay and state retirement pay because military retirees are still subject to being ordered back into service. Thus, their pay is, at least in part, pay for present services. *McCarty v. McCarty*, 453 U.S. 210, 221-222 (1981).

This argument does not account for the fact that the Georgia statute at issue taxed all federal civil service retirement pay, not specifically military benefits. Thus, it is difficult to accept the Defendants' claim that by taxing military retirement while exempting state retirement, the State was merely taxing a reduced current pay for reduced services. Therefore, because the sole distinction between the two groups of taxpayers is the source of income, one state and one federal, the statute which treated these taxpayers differently violated the principles of *Davis*.

III. Whether *Davis* should be applied retroactively?

In *Davis v. Michigan Department of The Treasury*, 489 U.S. 803 (1989), the Michigan Department of The Treasury conceded that should its tax scheme be found illegal, the plaintiff, Davis, would be entitled to a refund. For this reason, the U.S. Supreme Court did not reach the issue of whether its decision should be applied retroactively. This silence leaves the issue of retroactivity

to be resolved by the valid three-pronged test of *Chevron Oil v. Hudson,* 404 U.S. 97, 106-107 (1971). For a decision to be applied non-retroactively, it must first establish a new principle of law. Second, courts must look to the purpose of this rule to determine whether retroactive application will further or retard its operation. Third, courts must weigh the inequities or hardships imposed by retroactive application.

Three other state supreme courts, in North Carolina, South Carolina and Virginia, have already applied this *Chevron Oil* test to the *Davis* decision and decided that *Davis* applies prospectively only. *Ball v. State,* 395 S.E.2d 171 (S.C. 1990); *Harper v. Virginia Department of Taxation,* 241 Va. 232, 401 S.E.2d 868 (1991); *Swanson v. State of North Carolina,* No. 64PA91 (N.C. S.Ct., filed Aug. 14, 1991).

The *Davis* decision does not seem to be one that should be applied retroactively under the *Chevron Oil* test. According to Defendants' Brief in Support of Motion for Summary Judgment, at page 16, twenty-two (22) states other than Georgia had tax statutes similar to Michigan's. Thus, *Davis* did announce a new rule of law which was not clearly foreshadowed by prior decisions. Moreover, retroactive application would not further the principles of intergovernmental tax immunity, which is to attract qualified individuals to federal employment. Instead, retroactivity would act to punish the State for its

past treatment of federal retirees. Finally, the equities are in favor of prospective application only, as retroactive application could create a hardship for the Defendants.

## ORDER OF COURT

Wherefore, for the reasons discussed above, Defendants' Motion for Summary Judgment is hereby granted on the basis that *Davis v. Michigan* does not apply retroactively. It is also granted in part since the statute of limitations has run on claims for refunds of taxes paid in the years 1980 through 1984.

Likewise, the Plaintiff's Motion for Summary Judgment is granted in part in that the Georgia statute in question was violative of the principle set forth in *Davis*. Other than as previously stated, the Plaintiff's and the Defendants' Motions for Summary Judgment are hereby denied.

SO ORDERED this 10th day of December, 1991.

/s/_____

KENNETH KILPATRICK
Judge, Superior Court
Clayton Judicial Circuit

**APPENDIX D**

IN THE SUPREME COURT OF GEORGIA

| | | |
|---|---|---|
| CHARLES J. REICH, | ) | |
| | ) | |
| *Appellant,* | ) | |
| | ) | CASE NOS: S92A0621 |
| v. | ) | S92A0622 |
| | ) | |
| MARCUS E. COLLINS, SR., | ) | |
| | ) | |
| *Appellee.* | ) | |
| | ) | |

**MOTION FOR RECONSIDERATION**

COMES NOW Charles J. Reich, Appellant in the above matter, and moves this Court for reconsideration of its decision of November 19, 1992 because the decision of this Court violates fundamental due process and cannot be sustained on appeal.

Since 1985 Georgia has told its federal retiree citizens that their remedy for any taxes illegally collected under 4 U.S.C. § 111 was Georgia's refund statute, O.C.G.A § 48-2-35. In *Waldron v. Collins,* 788 F.2d 736

(11th Cir. 1986), Georgia used the existence of the refund statute to defeat federal jurisdiction in a challenge based on 4 U.S.C. § 111. After *Davis v. Michigan* was decided on March 28, 1989, the State told these citizens to file claims under the refund statute. The State continued to collect 1988 taxes even on returns filed after *Davis*. (Most returns were due on April 17, 1989).

Retirees were told that they could not file claims for years before 1985 because of the three year limitation period in the refund statute, and they were told that a claim for 1985 had to be filed on or before April 17, 1989. (*See, e.g.*, Ex. 2, Dep. of H. Thomassen). The Revenue Department's computerized computation of claims shows that retirees followed this advice by the thousands. (Ex. 5, Dep. of H. Thomassen). Almost 40,000 retirees filed 1985 refund claims. Most retirees filed their 1988 claims at a later date, if at all.

Three years later, this Court tells retirees that they should have ignored the refund statute and state officials because retirees had to file for 1988 on or before April 17, 1989, even though they had no notice of this procedure. By virtue of this Court's decision, the state affirmatively misled its federal retirees. Even without this circumstance, it is unconscionable to allow the State to collect and keep a tax after the U.S. Supreme Court has declared the tax unconstitutional. This is a patent

violation of fundamental due process, and this holding cannot be sustained.[1]

Further, the decision of this Court is so extreme and erroneous that it astronomically increases the risk to the state treasury from pending retiree and liquor tax refund claims. By unnecessarily eviscerating the refund statute, the Court leaves the state with no procedural defenses. The state now faces the real possibility that the U.S. Supreme Court will mandate refunds as a remedy just as it did in *McKesson Corp. v. Fla. Alcb. & Tob. Div.*, 496 U.S. 18, 110 S.Ct. 2238 (1990). Without the procedural barriers of the refund statute, the state will have to refund all taxes to retirees regardless of whether retirees submitted claims under the refund statute. This could increase the amount in issue fivefold. Additionally, the limitation period in the refund statute would not apply, so retirees could claim refunds back to the enactment of O.C.G.A § 48-7-27 in 1980. These barriers would also disappear in the liquor tax cases.

The tragedy is that the Court does not have to take these risks. There are enforceable procedural barriers in place under the refund statute that the Court can utilize to limit the state's exposure to refund claims

---

[1]At a minimum, the Court should allow refunds for 1988 for all taxpayers who filed a claim for any year on or before April 17, 1989. Surely those taxpayers would have filed a refund claim for 1988 at that time if they had had notice that was required.

in retiree and liquor tax cases. First, the statute limits refunds to claims made. Further, a reasonable reading of 48-2-35(b)(5) requires taxpayers to file suit within three years from the time the claim was made. (More than 2,500 taxpayers have filed suit based on this construction). The time has now passed for virtually all retiree taxpayers, and this procedural barrier reduces the state's exposure from $90 million to something on the order of $20 million. For tactical reasons, the Revenue Commissioner has opposed this interpretation. But this construction of the statute would be virtually unassailable on appeal. It would constitute a state's interpretation of an ambiguous provision of its own refund statute.[2]

Finally, in the liquor tax cases, Georgia law has established that the taxpayer has the burden of proving that it has standing in order to bring a claim under the refund statute. *Blackmon v. Ga. Ind. Oilmen's Assn.*, 129 Ga. App. 169, 198 S.E.2d 900 (1973). In other words, the out of state distillers have the burden of proving that they sustained the economic burden of the

---

[2]Moreover, there would be no appeals in the immediate future because all pending litigants would receive limited refunds. If there is to be Supreme Court review of Georgia's procedural limitations, this review would occur in the context of the liquor tax rather than the tax on federal retirees.

illegal tax and that they did not pass the effect of this tax to Georgia consumers. If they cannot meet this burden, they have no standing under the refund statute. As a pre-existing procedural requirement of the refund statute, this limitation is valid under *McKesson*.

*McKesson* does say that a state cannot bar refunds to a taxpayer on the speculative theory that the taxpayer might enjoy a windfall. *McKesson* is careful, though, to draw a distinction between the speculative use of this pass on argument as an equitable consideration and the separate requirement of an economic burden for standing. The former is precluded by *McKesson*, but the latter is allowed. *See McKesson*, 110 S.Ct. at 2255-2257 and fn. 34. In fact, *McKesson* emphasizes the enforceability of procedural limitations generally.

All of these procedural protections that exist within the framework of the refund statute are destroyed by this Court's decision of November 19. The Court effectively takes a long shot gamble that the new procedure it announces can sustain a due process challenge. If the gamble is successful, no refunds will be paid to retirees or out of state distillers. If the gamble fails, the state's liability for refunds is dramatically increased.

Clearly a better and fairer result is to pay refunds to those retirees who have passed over all of the procedural hurdles of the refund statute. The state will

face a certain but modest liability for refunds. The refund statute will remain valid, and the state significantly increases its chances of refunding taxes only to distillers who can carry their burden of proving they suffered an economic loss. Appellant respectfully urges the Court to allow refunds to those retirees who filed timely claims and who initiated litigation within three years from the time of filing.

Respectfully submitted,

McALPIN, HENSON & KEARNS

BY: Carlton M. Henson
Georgia Bar #348075

Eleven Piedmont Center
Suite 400
3495 Piedmont Road, N.E.
Atlanta, Georgia 30305
(404) 239-0774

## APPENDIX E

O.C.G.A. § 48-2-35

(a) A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state, whether paid voluntarily or involuntarily, and shall be refunded interest on the amount of the taxes or fees at the rate of 9 percent per annum from the date of payment of the tax or fee to the commissioner. Refunds shall be drawn from the treasury on warrants of the Governor issued upon itemized requisitions showing in each instance the person to whom the refund is to be made, the amount of the refund, and the reason for the refund.

(b) (1) A claim for refund of a tax or fee erroneously or illegally assessed and collected may be made by the taxpayer at any time within three years after the date of the payment of the tax or fee to the commissioner. Each claim shall be filed in writing in the form and containing such information as the commissioner may reasonably require and shall include a summary statement of the grounds upon which the taxpayer relies. Should any person be prevented from filing such an application because of his own or his

counsel's service in the armed forces during such period, the period of limitation shall date from his or his counsel's discharge from the service.

(2) In the event the taxpayer desires a conference or hearing before the commissioner in connection with any claim for refund, he shall specify such desire in writing in the claim and, if the claim conforms with the requirements of this Code section, the commissioner shall grant a conference at a time he shall reasonably specify.

(3) The commissioner or his delegate shall consider information contained in the taxpayer's claim for refund, together with such other information as may be available, and shall approve or disapprove the taxpayer's claim and notify the taxpayer of his action.

(4) Any taxpayer whose claim for refund is denied by the commissioner or his delegate or whose claim is not decided by the commissioner or his delegate within one year from the date of filing the claim shall have the right to bring an action for a refund in the superior court of the county of the residence of the taxpayer, except that:

(A) If the taxpayer is a public utility or a nonresident, the taxpayer shall have the right to bring an action for a refund in the superior court of the county in which is located the taxpayer's principal place of doing business in this state or in which the taxpayer's chief or highest corporate officer or employee resident in this state maintains his office; or

(B) If the taxpayer is a nonresident individual or foreign corporation having no place of doing business and no officer or employee resident and maintaining his office in this state, the taxpayer shall have the right to bring an action for a refund in the Superior Court of Fulton County or in the superior court of the county in which the commissioner in office at the time the action is filed resides.

(5) No action or proceeding for the recovery of a refund under this Code section shall be commenced before the expiration of one year from the date of filing the claim for refund unless the commissioner or his delegate renders a decision on the claim within that time, nor shall any action or proceeding be commenced after the expiration of two years from the date the claim is denied. The two-year

period prescribed in this paragraph for filing an action for refund shall be extended for such period as may be agreed upon in writing between the taxpayer and the commissioner during the two-year period or any extension thereof.

(c) In the event any taxpayer's claim for refund is approved by the commissioner or his delegate and the taxpayer has not paid other state taxes which have become due, the commissioner or department may set off the unpaid taxes against the refund. When the setoff authorized by this subsection is exercised, the refund shall be deemed granted and the amount of the setoff shall be considered for all purposes as a payment toward the particular tax debt which is being set off. Any excess refund remaining after the setoff has been applied shall be refunded to the taxpayer.

**APPENDIX F**

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

| | | |
|---|---|---|
| AVERY T. SALTER, JR., CHARLES J. REICH, and ROBERT L. NEAL, | ) | |
| *Plaintiffs,* | ) | |
| | ) | CIVIL ACTION FILE |
| v. | ) | NO. D-71448 |
| THE STATE OF GEORGIA, GOVERNOR JOE FRANK HARRIS, AND STATE REVENUE COMMISSIONER MARCUS E. COLLINS, SR., | ) | |
| *Defendants.* | ) | |

**ORDER**

Upon full consideration of the entire record, Respondents' Motion to Dismiss or for Judgment on the Pleadings is hereby GRANTED.

Because of the Doctrine of Sovereign Immunity, the State may not be sued without its consent. Any consent to be sued which is extended by the State may not be expanded in scope and therefore must be strictly construed. *Ingalls Iron Works Company v. Blackmon,* 133 Ga. App. 164 (1974), citing *Schaffer v. Oxford,* 102 Ga. App. 710 (1960). Section 48-2-35(b)(4) of the Official Code of Georgia Annotated expressly waives sovereign immunity and allows for actions for tax refunds be brought against the State. However, a condition precedent to the State's consent to be sued pursuant to O.C.G.A § 48-2-35 is the filing of a claim for refund by the taxpayer. *Blackmon v. Georgia Independent Oilman's Association et al.,* 129 Ga. App. 171, 173 (1973), citing *Henderson v. Carter,* 229 Ga. 876 (1972).

Plaintiffs have failed to satisfy the condition precedent to waiver of sovereign immunity under O.C.G.A § 48-2-35. Neither Plaintiffs' Petition for Declaratory Judgment and Injunctive relief nor any of the amendments thereto allege facts asserting that Plaintiffs have filed a claim for a refund as required by O.C.G.A § 48-2-35(b)(4). Accordingly, Plaintiffs cannot, as a matter of law, have standing to sue and Defendants' Motion to Dismiss should be and is hereby GRANTED. See Id.

This 27th day of MARCH, 1990.

/s/_____

Joel J. Fryer

Judge, Fulton Superior Court, A.J.C.

2

Supreme Court, U.S.
FILED
FEB 26 1993
OFFICE OF THE CLERK

No. 92-1276

In The

# Supreme Court of the United States

October Term, 1992

CHARLES J. REICH,

*Petitioner,*

v.

MARCUS E. COLLINS and THE GEORGIA DEPARTMENT OF REVENUE,

*Respondents.*

**Petition For Writ Of Certiorari To The Supreme Court Of Georgia**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WARREN R. CALVERT
Senior Assistant Attorney General
(Counsel of Record for Respondents)

MICHAEL J. BOWERS
Attorney General

DANIEL M. FORMBY
Senior Assistant Attorney General

*Attorneys for Respondents*

Georgia Department of Law
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3370

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

23 pp

## QUESTIONS PRESENTED

1. Whether this Court should grant certiorari to determine if Due Process requires the State of Georgia to refund income taxes voluntarily paid on federal retirement benefits before this Court's decision in *Davis v. Michigan*, 489 U.S. 803 (1989), for years when state retirement benefits were exempt from taxation in Georgia, where petitioner failed to properly raise this argument below.

2. Whether this Court should grant certiorari to determine if the Supreme Court of Georgia, by construing Georgia's income tax refund statute to be inapplicable to taxes paid under a law later held invalid, deprived the petitioner of a statutory right to such a refund, in violation of Due Process.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

TABLE OF AUTHORITIES ..... iii

CITATION TO OPINION BELOW ..... 2

STATEMENT OF THE CASE ..... 2

SUMMARY OF ARGUMENT ..... 4

ARGUMENT ..... 5

I. THIS COURT SHOULD NOT GRANT CERTIORARI TO DETERMINE IF DUE PROCESS REQUIRES THE STATE OF GEORGIA TO REFUND INCOME TAXES WHICH PETITIONER VOLUNTARILY PAID ON HIS FEDERAL RETIREMENT BENEFITS, WHERE PETITIONER FAILED TO PROPERLY RAISE THIS ARGUMENT BELOW ..... 6

II. THIS COURT SHOULD NOT GRANT CERTIORARI TO DETERMINE IF THE GEORGIA SUPREME COURT, BY CONSTRUING GEORGIA'S INCOME TAX REFUND STATUTE TO BE INAPPLICABLE TO TAXES PAID UNDER A LAW LATER HELD INVALID, DEPRIVED THE PETITIONER OF A STATUTORY RIGHT TO SUCH A REFUND, IN VIOLATION OF DUE PROCESS ..... 12

CONCLUSION ..... 16

# TABLE OF AUTHORITIES

Page

CASES

*Atchison, Topeka & Santa Fe Railroad Co. v. O'Connor*, 223 U.S. 280 (1912) ..... 11

*Beck v. Washington*, 369 U.S. 541 (1962) ..... 6

*Blackmon v. Golia*, 231 Ga. 381, 202 S.E.2d 186 (1973) ..... 9

*Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930) ..... 15, 16

*Cardinale v. Louisiana*, 394 U.S. 437 (1969) ..... 6

*Chevron Oil v. Huson*, 404 U.S. 97 (1971) ..... 3

*Collins v. Waldron*, 259 Ga. 582, 385 S.E.2d 74 (1989) ..... 13, 14

*Davis v. Michigan*, 489 U.S. 803 (1989) ..... *passim*

*Eibel v. Forrester*, 194 Ga. 439, 22 S.E.2d 96 (1942) .... 13

*Gainesville-Hall County Economic Opportunity Organization, Inc. v. Blackmon*, 233 Ga. 507, 212 S.E.2d 341 (1975) ..... 9

*Garr, Scott & Co. v. Shannon*, 223 U.S. 468 (1912) .... 11

*Harper v. Virginia Dep't of Taxation*, No. 91-794 ..... 7

*Henderson v. Carter*, 229 Ga. 876, 195 S.E.2d 4 (1972) ..... 12, 13

*Hill v. California*, 401 U.S. 797 (1971) ..... 6

*James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991) ..... 3

TABLE OF AUTHORITIES – Continued

Page

*Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387 (1923) ..... 17

*Marks v. United States*, 430 U.S. 188 (1977) ..... 14

*McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990) ..... 4, 7, 8, 9, 10, 11

*New York Central Railroad Co. v. White*, 243 U.S. 188 (1917) ..... 14

*Patterson v. Colorado*, 205 U.S. 454 (1907) ..... 15

*Railroad Co. v. Commissioners*, 98 U.S. 541 (1878) ..... 11

*Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955) ..... 17

*Tidal Oil Co. v. Flanagan*, 263 U.S. 444 (1924) ..... 15

*Union Pacific Railroad Co. v. Public Service Comm'n*, 248 U.S. 67 (1918) ..... 11

*United States v. New York and Cuba Mail Steamship Co.*, 200 U.S. 488 (1906) ..... 11

*Waldron v. Collins*, 788 F.2d 736 (1986) ..... 9

*Ward v. Love County*, 253 U.S. 17 (1920) ..... 11

*Wright v. Forrester*, 192 Ga. 864, 16 S.E.2d 873 (1941) ..... 13

STATUTES

4 U.S.C. § 111 ..... 2

O.C.G.A. § 5-6-35(a) ..... 3

O.C.G.A. § 48-2-35 ..... 3, 12, 13, 16

TABLE OF AUTHORITIES – Continued

Page

O.C.G.A. § 48-2-43 ..... 11

O.C.G.A. § 48-2-59 ..... 8

O.C.G.A. § 48-3-1 ..... 8, 9

O.C.G.A. § 48-7-27(a)(4) (1982) ..... 2

O.C.G.A. § 48-7-27(a)(5) (Supp. 1992) ..... 2

O.C.G.A. § 48-7-86(a)(2) ..... 10

O.C.G.A. § 50-13-12 ..... 8

O.C.G.A. § 50-13-12(c) ..... 9

O.C.G.A. § 50-13-19 ..... 8

O.C.G.A. § 50-13-19(d) ..... 9

OTHER AUTHORITIES

U.S. Sup. Ct. Rule 10 ..... 17

U.S. Sup. Ct. Rule 10.1(c) ..... 17

No. 92-1276

In The

# Supreme Court of the United States

October Term, 1992

CHARLES J. REICH,

*Petitioner,*

v.

MARCUS E. COLLINS and THE GEORGIA DEPARTMENT OF REVENUE,

*Respondents.*

**Petition For Writ Of Certiorari To The Supreme Court Of Georgia**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents in the above-styled action respectfully oppose the Petition for Writ of Certiorari to the Supreme Court of Georgia. The first question presented by the petition was not properly raised below. In addition, both questions concern issues to which this Court has already spoken, and which the Court has resolved against the position of the petitioner here. Accordingly, Respondents request that the petition be denied.

## CITATION TO OPINION BELOW

The opinion of the Georgia Supreme Court is officially reported at 262 Ga. 625 (1992), and is unofficially reported at 422 S.E.2d 846 (1992). In addition, the text of the opinion is included as Appendix A to the Petition for Writ of Certiorari.

## STATEMENT OF THE CASE

On March 28, 1989, this Court ruled in *Davis v. Michigan*, 489 U.S. 803 (1989), that income tax statutes in Michigan, which provided for the taxation of federal retirement benefits but exempted retirement benefits paid by the state and its political subdivisions, violated 4 U.S.C. § 111 and principles of intergovernmental tax immunity. At the time of the *Davis* decision, Georgia's income tax statutes totally exempted pension income received from the Employees' Retirement System of Georgia, the Teachers Retirement System of Georgia, and certain other retirement systems, *see* O.C.G.A. § 48-7-27(a)(4) (1982), but did not afford the same treatment to federal retirement benefits. In response to *Davis*, the Georgia General Assembly, during special session in September 1989, amended Georgia's law to provide identical treatment for federal, state, and private pensions, for the tax years 1989 and forward. *See* O.C.G.A. § 48-7-27(a)(5) (Supp. 1992).

Shortly after *Davis* was announced, Petitioner Charles J. Reich ("Colonel Reich" or "the taxpayer") filed refund claims with the Department of Revenue for Georgia income taxes which he had voluntarily paid on his military retirement benefits for the years 1985 through

1988. When the Department denied his claims, the taxpayer brought suit under O.C.G.A. § 48-2-35, contending that Georgia's taxation of such amounts violated the principles set forth in *Davis*, the Fifth and Fourteenth Amendments to the U.S. Constitution, and comparable provisions of the Georgia Constitution. Both the Respondents and the taxpayer subsequently filed motions for summary judgment.

In its final order, the trial court ruled that Georgia's pre-1989 income tax statute was legally indistinguishable from the statute considered in *Davis*. (Petition for Writ of Certiorari, Appendix C.) However, the trial court also determined, based on the three-part test set forth in *Chevron Oil v. Huson*, 404 U.S. 97 (1971), that *Davis* should not be applied retroactively to any tax years ending before the *Davis* decision was rendered, and that no refunds were due. The Georgia Supreme Court granted Colonel Reich's application for discretionary appeal. *See* O.C.G.A. § 5-6-35(a).

On November 19, 1992, the Georgia Supreme Court held that the state's pre-1989 income tax statutes violated the principles of *Davis*, and that this Court's decision in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991), mandated retroactive application of *Davis*. However, the Georgia Supreme Court also determined that O.C.G.A. § 48-2-35, which provides for refunds of taxes "erroneously or illegally assessed and collected", did not apply to taxes paid under a law later held unconstitutional, and that Colonel Reich was therefore not entitled under that statute to the refunds he sought. The taxpayer's motion for reconsideration was denied on

December 17, 1992. The instant petition for certiorari was filed on January 29, 1993.

On pages 4 and 5 of his petition, the taxpayer refers to other litigation in which he was involved before the present action was commenced. The taxpayer refers to the earlier lawsuit as "an equitable action for refunds", and he attaches to his petition a copy of the trial court's order dismissing his complaint. (Petition for Writ of Certiorari, Appendix F.) The earlier action was not "an equitable action for refunds", as the taxpayer alleges. Moreover, if the prior lawsuit is at all material to the arguments which the taxpayer wants the Court to consider, then certiorari should be denied because the proceedings in that action are not a matter of record here.

## SUMMARY OF ARGUMENT

Although the taxpayer frames his petition in terms of a single "Question Presented", he actually asserts two distinct legal arguments for this Court's review. The first – whether Due Process requires the State of Georgia to refund income taxes which he voluntarily paid on his federal retirement benefits before this Court's decision in *Davis v. Michigan*, 489 U.S. 803 (1989), even through pre-deprivation remedies were available under state law to contest such taxes prior to payment – was not raised by the taxpayer in the state court proceedings and was not addressed by the Georgia Supreme Court. It also concerns a legal issue which has already been answered by this Court in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990). The taxpayer's second

argument – that the Supreme Court of Georgia, by virtue of its construction of Georgia's income tax refund provisions, deprived him of a statutory right to such a refund, in violation of Due Process – is based on the taxpayer's belief that a state court decision on a question of state law violates the Fourteenth Amendment if the decision reverses prior cases or is somehow "wrong". While the Respondents do not agree with the taxpayer's characterization of the Georgia Supreme Court's opinion, the general proposition on which the argument rests has been explicitly rejected by this Court, and certiorari need not be granted in order to reject the proposition again.

## ARGUMENT

The taxpayer states the "Question Presented" as follows: "[W]hether a state violates the Due Process Clause when it collects taxes from its citizens in violation of the U.S. Constitution, provides its citizens a right to refunds for the unconstitutional taxation, and then eliminates the right to refunds after the time has run for any other relief." In fact, the taxpayer's petition advances two distinct legal arguments, neither of which is fairly reflected in the single question posed by the taxpayer. The taxpayer asserts that Due Process requires the State of Georgia to refund income taxes which he voluntarily paid on federal retirement benefits before this Court's decision in *Davis v. Michigan*, 489 U.S. 803 (1989), for years when state retirement benefits were exempt from taxation in Georgia, even though predeprivation remedies were available under state law to contest such taxes prior to

payment. *See* Petition for Writ of Certiorari, pp. 8-13. The taxpayer also maintains that the Georgia Supreme Court, by construing Georgia's income tax refund statute to be inapplicable to taxes paid under a law later held invalid, deprived him of a statutory right to such a refund, in violation of Due Process. Neither argument warrants a grant of certiorari in this case, for the reasons discussed below.

## I. THIS COURT SHOULD NOT GRANT CERTIORARI TO DETERMINE IF DUE PROCESS REQUIRES THE STATE OF GEORGIA TO REFUND INCOME TAXES WHICH PETITIONER VOLUNTARILY PAID ON HIS FEDERAL RETIREMENT BENEFITS, WHERE PETITIONER FAILED TO PROPERLY RAISE THIS ARGUMENT BELOW

Assuming a federal question has been properly framed, it is essential that it be raised, presented, and pursued in a timely and proper manner at the appropriate point in the state court proceedings. *See Beck v. Washington*, 369 U.S. 541, 550-54 (1962). *See also Hill v. California*, 401 U.S. 797, 805 (1971), *citing Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (a federal claim cannot be considered by the Court unless it has been either raised in the state court or considered and resolved by the state court). According to the taxpayer, "[t]he . . . question sought to be reviewed . . . was not created until the November 19, 1992 decision of the Supreme Court of Georgia." Petition for Writ of Certiorari, p. 6. On pages 8 through 13 of his petition, however, the taxpayer argues a point that could have been, but was not, raised earlier: that Due Process itself provides a constitutional right to

the refunds sought, irrespective of any refund statute. Under the authorities above, this contention simply comes too late.

In any event, the argument that Due Process requires the State of Georgia to refund taxes which Colonel Reich voluntarily paid on his retirement benefits for years before *Davis*, even through predeprivation remedies were available under state law to contest such taxes prior to payment, is one which the Court's decision in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), quickly settles. Without dispute, Due Process may act as a restraint in state tax matters. As stated in *McKesson*,

> if a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.

*Id.* at 31 (footnotes omitted). Respondents respectfully submit that *McKesson* addresses only a state's Due Process obligation to return taxes collected under a statute which the state, from the date of the statute's enactment, knew or should have known was unconstitutional. Respondents also submit that the unconstitutionality of Georgia's tax treatment of federal retirees was anything but clear prior to *Davis*. *See* Brief for Respondent, *Harper v. Virginia Dep't of Taxation*, No. 91-794. For purposes of the instant petition, however, the Court need not concern itself with these arguments, because the Due Process

rights of the taxpayer here were not violated by the State of Georgia even under a broader reading of *McKesson*.

> [I]n order to satisfy the commands of the Due Process Clause[, the] State may choose to provide a form of "predeprivation process," for example, by authorizing taxpayers to bring suit to enjoin imposition of a tax prior to its payment, or by allowing taxpayers to withhold payment and then interpose their objections as defenses in a tax enforcement proceeding initiated by the State.

*McKesson*, 496 U.S. at 36-37 (footnotes omitted). "The availability of a predeprivation hearing constitutes a procedural safeguard against unlawful deprivation sufficient by itself to satisfy the Due Process Clause, and taxpayers cannot complain if they fail to avail themselves of this procedure." *Id.* at 38, n.21.

At least three distinct statutory methods exist whereby an individual can contest his Georgia income tax liability prior to payment. A taxpayer may, within 30 days of the issuance of an assessment against him, request a hearing under Georgia's Administrative Procedure Act. O.C.G.A. § 50-13-12. If he receives an adverse administrative decision, the aggrieved taxpayer may seek superior court review. O.C.G.A. § 50-13-19. After receiving a notice of assessment, a taxpayer may choose to forego an administrative hearing, appealing directly to the superior court for judicial review. O.C.G.A. § 48-2-59. A taxpayer may file an affidavit of illegality to any levy of execution and obtain a hearing in superior court on the underlying assessment. O.C.G.A. § 48-3-1.

*See Gainesville-Hall County Economic Opportunity Organization, Inc. v. Blackmon*, 233 Ga. 507, 212 S.E.2d 341 (1975); *Waldron v. Collins*, 788 F.2d 736, 738 (1986). In addition, if the statutory remedies are inadequate for any reason, the taxpayer can bring an equitable action to enjoin collection of an unconstitutional tax. *See generally Blackmon v. Golia*, 231 Ga. 381, 202 S.E.2d 186 (1973) (suit for injunctive relief to challenge constitutionality of alcohol tax statute). In providing such predeprivation remedies, the State of Georgia has done all that Due Process requires, even were Georgia's tax treatment of federal retirees clearly unconstitutional before *Davis*.

Nevertheless, the taxpayer here argues that Georgia's predeprivation remedies do not satisfy the Due Process standard articulated in *McKesson*. *See* Petition For Writ of Certiorari, pp. 11-12. There is no authority whatsoever for the taxpayer's claim that enforced collection action can properly be taken in Georgia against a person whose tax liability is already in court under either O.C.G.A. § 48-2-59 or O.C.G.A. § 48-3-1, and Georgia's APA expressly provides a means for staying enforcement of a tax assessment pending a final ruling in any action brought under that procedure. *See* O.C.G.A. §§ 50-13-12(c),-19(d). Colonel Reich's contention that Georgia's predeprivation remedies fail the *McKesson* Due Process test because a taxpayer pursuing such a remedy "is . . . subject to criminal prosecution" for nonpayment is also meritless. Petition For Writ of Certiorari, p. 12. A taxpayer with a bona fide dispute is not compelled "under duress" to forego a predeprivation remedy, within the meaning of *McKesson*, simply because a state official, acting unreasonably or in bad faith, *could* try to prosecute

for nonpayment of such taxes, where no actual threats or attempts to prosecute have been made.

Consequently, the taxpayer's Due Process objections to Georgia's predeprivation remedies distill down to the fact that an unpaid tax liability is subject to interest and possibly penalties. This contention trivializes *McKesson* and the cases upon which that decision is based. In *McKesson*, the Court observed that "Florida has . . . established[ed] various sanctions and summary remedies designed so that liquor distributors tender tax payments *before* their obligations are entertained and resolved," including the right to levy upon and sell property to recover unpaid taxes, and the right to revoke a delinquent taxpayer's license to do business in the state. *McKesson*, 496 U.S. at 38 (emphasis in original).

> As a result, Florida does not purport to provide taxpayers like petitioner with a meaningful opportunity to withhold payment and to obtain a predeprivation determination of the tax assessment's validity; rather, Florida requires the taxpayers to raise their objections to the tax in a post-deprivation refund action.

*Id.* at 38 (footnote omitted). By contrast, no decision has ever held that state provisions allowing interest or appropriate penalties[1] on delinquent liabilities would alone

---

[1] Georgia's failure-to-pay penalty is not assessed "when . . . the failure is due to reasonable cause and not due to willful neglect." O.C.G.A. § 48-7-86(a)(2). Moreover, no penalties are imposed by the State Revenue Commissioner when "the default giving rise to the penalty was due to reasonable cause and not due to gross or willful neglect or disregard of the law or of

amount to "duress" for Due Process purposes, and thereby obligate the state to refund amounts voluntarily paid under a tax statute subsequently held unconstitutional. *Cf. Ward v. Love County,* 253 U.S. 17 (1920) (payment to prevent distress sale); *Union Pacific Railroad Co. v. Public Service Comm'n,* 248 U.S. 67 (1918) (non-payment of fee would have invalidated bonds issued by railroad); *Garr, Scott & Co. v. Shannon,* 223 U.S. 468 (1912) (non-payment would have forfeited right to do business); *Atchison, Topeka & Santa Fe Railway Co. v. O'Connor,* 223 U.S. 280 (1912) (forfeiture of right to do business). As a general rule,

> [w]here a party pays an illegal demand, with full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary, and cannot be recovered back.

*Railroad Co. v. Commissioners,* 98 U.S. 541, 543-44 (1878). *Accord United States v. New York and Cuba Mail Steamship Co.,* 200 U.S. 488, 494 (1906). Respondents know of no predeprivation tax remedy, whether federal or state, that satisfies the Due Process "duress" test advocated by the taxpayer here, a test which is not supported by the *McKesson* decision or the cases upon which *McKesson* relied.

---

regulations or instructions issued pursuant to law." O.C.G.A. § 48-2-43.

## II. THIS COURT SHOULD NOT GRANT CERTIORARI TO DETERMINE IF THE GEORGIA SUPREME COURT, BY CONSTRUING GEORGIA'S INCOME TAX REFUND STATUTE TO BE INAPPLICABLE TO TAXES PAID UNDER A LAW LATER HELD INVALID, DEPRIVED THE PETITIONER OF A STATUTORY RIGHT TO SUCH A REFUND, IN VIOLATION OF DUE PROCESS

The taxpayer also argues that the Georgia Supreme Court, by virtue of its interpretation of O.C.G.A. § 48-2-35, has deprived him of a statutory right to the refunds he seeks, in violation of Due Process. Although not entirely clear, the taxpayer's contention seems based on his assertion that the Georgia Supreme Court has "torture[d] the plain language of the statute", ignoring prior case law "establish[ing] that this procedure was applicable to unconstitutional taxes." Petition for Writ of Certiorari, pages 14-15. Although the taxpayer's assertion in this respect is without legal significance, for reasons to be discussed, the cases cited by the taxpayer do not in any event support his claim of what the Georgia Supreme Court has supposedly done.

The taxpayer relies on three prior decisions of the Georgia Supreme Court in arguing that the court "[had] previously held that the refund statute applies to claims for refunds of unconstitutional taxes." Petition for Writ of Certiorari, pp. 9-10. In *Henderson v. Carter*, 229 Ga. 876, 195 S.E.2d 4 (1972), the Georgia Supreme Court affirmed the dismissal of a mandamus action seeking certain sales tax refunds because, among other reasons, the taxpayer had an adequate legal remedy under the refund statute. *Id.* at 880, 195 S.E.2d at 7. However, the plaintiff in that

case did not argue that the tax statute under which the disputed amounts had been paid was itself unconstitutional. Rather, the plaintiff asserted only "that *the refusal . . . to refund such moneys* amount[ed] to depriving the complainant . . . of [her] rightful property without due process of law." *Id.* at 877, 195 S.E.2d at 5 (emphasis added).

The case of *Wright v. Forrester,* 192 Ga. 864, 16 S.E.2d 873 (1941) did concern taxes collected under an allegedly unconstitutional law. The taxpayer pursued a refund claim under the predecessor of O.C.G.A. § 48-2-35, subsequently bringing a mandamus action under the refund statute to compel approval of his claim. *Id.* at 866, 16 S.E.2d at 874. The Georgia Supreme Court held merely that the refund statute did not provide for mandamus, affirming the trial court's dismissal of the complaint. In later litigation involving identical taxes, the Georgia Supreme Court found that the refund statute did not apply at all, because the disputed amounts were for periods prior to the statute's effective date. *Eibel v. Forrester,* 194 Ga. 439, 441, 22 S.E.2d 96, 98 (1942).

Finally, the Georgia Supreme Court's passing reference to the refund statute in *Collins v. Waldron,* 259 Ga. 582, 385 S.E.2d 74 (1989), set out in footnote 1 of the court's opinion, is dictum which does not have the precedential weight which the taxpayer attributes to it. The interlocutory appeal to the Georgia Supreme Court in that case, which was brought immediately after *Davis* was decided, concerned "an injunction issued by the [Richmond County] superior court on April 14, 1989, directing that [the state revenue commissioner] maintain an escrow fund for all payments of income taxes attributable to

federal pensions" pending a ruling on the constitutionality of Georgia's income tax scheme. *Id.* at 582, 385 S.E.2d at 74. By the time of the Georgia Supreme Court's decision, the legislature had amended Georgia's statutes to eliminate any disparity between state and federal retirees. Since the constitutionality of Georgia's new law was not in doubt, and since it was unlikely that the Revenue Department would still be receiving payments for tax years unaffected by the change, the Georgia Supreme Court found that the purpose for the injunction no longer existed, vacating the lower court's judgment.

The taxpayer would have no Due Process claim, however, even if he were correct in characterizing the opinion of the Georgia Supreme Court in this case as contrary to "clearly established precedent". An unforeseeable judicial enlargement of a criminal statute, applied retroactively, may violate a defendant's Due Process right "to fair warning of that conduct which will give rise to criminal penalties." *Marks v. United States*, 430 U.S. 188, 191 (1977). But in the civil context, "[n]o one has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." *New York Central Railroad Co. v. White*, 243 U.S. 188, 198 (1917).

> Even if it be true . . . that the [state court] departed from earlier and well-established precedents to meet the exigencies of this case, whatever might be thought of the justice or wisdom of such a step, the Constitution of the United States is not infringed. . . . [T]he decision of a court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the Fourteenth

> Amendment merely because it is wrong or because earlier decisions are reversed.

*Patterson v. Colorado*, 205 U.S. 454, 461 (1907). *Accord Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 450 (1924) ("the mere fact that the state court reversed a former decision to the prejudice of one party does not take away his property without due process of law").

The case upon which the taxpayer appears largely to rely, *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930), is easily distinguished on its facts. The plaintiff in *Brinkerhoff* brought suit in Missouri to enjoin the collection of certain disputed taxes, using the only remedy which, according to settled state law, was available to contest such liabilities. After the trial court dismissed the plaintiff's complaint, an appeal was taken to the Missouri Supreme Court. The Missouri Supreme Court affirmed, holding that a suit in equity was improper because the plaintiff had not first exhausted an administrative remedy before the Missouri State Tax Commission. In so holding, the court overruled a prior decision that the administrative remedy could not be used in such cases. By this time, however, it was too late for the plaintiff to invoke the alternative procedure.

This Court reversed, stating that "[i]t is plain that the practical effect of the judgment of the Missouri court is to deprive the plaintiff of property without affording it *at any time* an opportunity to be heard in its defense." 281 U.S. at 678 (emphasis added).

> [U]ntil . . . the [Missouri Supreme Court's] opinion in the case at bar was delivered, the Tax Commission could not, because of [the Missouri Supreme Court's earlier decision], grant the

> relief to which the plaintiff was entitled on the facts alleged. After [the Missouri Supreme Court's opinion], the Commission could not grant such relief to this plaintiff because, under the decision of the court in this case, the time in which the Commission could act had long expired. Obviously, therefore, *at no time* did the State provide to the plaintiff an administrative remedy against the alleged illegal tax.

*Id.* at 679 (emphasis added). In the Court's view, "[i]f the judgment is permitted to stand, deprivation of plaintiff's property is accomplished without its *ever* having had an opportunity to defend against the exaction." *Id.* at 679. The Court was careful to point out, however, that "[s]tate courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of the earlier decisions." *Id.* at 681, n.8.

Because there were ample other procedures by which Colonel Reich might have contested the Georgia tax on his federal retirement benefits, this case is unlike *Brinkerhoff*, and the taxpayer is no better off than any litigant who "assume[s] the risk that the ultimate interpretation by the highest court [of any particular procedure] might differ from [his] own." *Brinkerhoff*, 281 U.S. at 682, n.9. The taxpayer's Due Process attack on the Georgia Supreme Court's interpretation of O.C.G.A. § 48-2-35 is without merit.

## CONCLUSION

Review on writ of certiorari is a matter of judicial discretion and should be granted only when there are

special and important reasons for it. U.S. Sup. Ct. Rule 10; *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 73 (1955). Certiorari should not be granted "except in cases involving principles . . . of importance to the public as distinguished from that of the parties." *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). Such cases include those which concern "an important question of federal law which has not been, but should be, settled by this Court". U.S. Sup. Ct. Rule 10.1(c). The refunds sought from the State of Georgia by federal retirees for years before this Court's decision in *Davis* are significant. However, the constitutional arguments which Colonel Reich seeks to raise in this case, even to the extent properly preserved, do not warrant this Court's review, because they have been settled by this Court's prior opinions. Respondents therefore respectfully request that the petition be denied.

Respectfully submitted,

WARREN R. CALVERT
Senior Assistant Attorney General
(Counsel of Record for
Respondents)

MICHAEL J. BOWERS
Attorney General

DANIEL M. FORMBY
Senior Assistant Attorney General

*Attorneys for Respondents*

Georgia Department of Law
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3370

Supreme Court, U.S.
FILED
MAR 22 1993
OFFICE OF THE CLERK

No. 92-1276

In The

# Supreme Court of the United States

October Term, 1992

CHARLES J. REICH v. MARCUS E. COLLINS and THE GEORGIA DEPARTMENT OF REVENUE

On Petition For Writ Of Certiorari
To The Supreme Court Of Georgia

## REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CARLTON M. HENSON
Counsel of Record

McALPIN, HENSON & KEARNS
Eleven Piedmont Ctr., Ste. 400
3495 Piedmont Road
Atlanta, GA 30305
(404) 239-0774

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

No. 92-1276

In The

# Supreme Court of the United States

October Term, 1992

CHARLES J. REICH, PETITIONER, v. MARCUS E. COLLINS and THE GEORGIA DEPARTMENT OF REVENUE, RESPONDENTS

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

## REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner urges this Court to grant his certiorari petition. The State obscures its due process violations by ignoring the facts and attempting to recast the issues based on more favorable, but fictional, circumstances. The fundamental and undeniable facts are that the State of Georgia illegally taxed its federal retirees, told them they had a right to refunds, and then eliminated this remedy after the time had run for any other relief.

### I. Petitioner Properly Raised His Due Process Arguments Below.

The Supreme Court of Georgia issued its decision on November 19, 1991. Petitioner's due process claims were not created until the Georgia Supreme Court *sua sponte*

obliterated Georgia's refund statute in its decision. Petitioner expressly raised his due process claims in his Motion for Reconsideration before the Georgia Supreme Court. This Motion began:

> COMES NOW Charles J. Reich, Appellant in the above matter, and moves this Court for reconsideration of its decision of November 19, 1992 because the decision of this Court violates fundamental due process and cannot be sustained on appeal.

(App. D, p. 1 to Petition for Writ of Certiorari).

Petitioner then made virtually the same argument to the Georgia court that he makes in the Petition for Writ of Certiorari. He recited prior Georgia case law, direction by state officials to follow the refund statute, and the effect of the November 19, 1992 decision:

> By virtue of this Court's decision, the State affirmatively misled its federal retirees. Even without this circumstance, it is unconscionable to allow the State to collect and keep a tax after the U.S. Supreme Court has declared the tax unconstitutional. This is a patent violation of fundamental due process, and this holding cannot be sustained.

(Motion for Reconsideration p. 2, 3). This is the basic *McKesson* argument Petitioner makes in the Petition for Writ of Certiorari. It violates due process for a state to collect and keep unconstitutional taxes without providing its taxpayers a remedy. On the very next page, Petitioner advised the Georgia Supreme Court that *McKesson* would require the mandate of refunds as a remedy if the court did not reconsider its decision. With only ten days to file

the Motion for Reconsideration, Petitioner may not have made his argument perfectly, but the Georgia Supreme Court had ample opportunity to consider the due process implications of its decision. In rejecting Petitioner's Motion for Reconsideration, the Georgia court did not even trouble itself with an opinion.

## II. The State Fails to Address the Remedy Roulette Feature of the Georgia Scheme.

The State argues that there is no *McKesson* or due process violation because there was no duress[1] and the State provided predeprivation remedies. Whether other remedies were theoretically or academically available to Georgia retirees is not the central issue.[2] Regardless of the merits of the purported predeprivation remedies here, the State of Georgia affirmatively told its citizens that there was a refund remedy, and this dissuaded them from attempting other remedies. The State then took away this

---

[1] The State says possible criminal sanctions of O.C.G.A. § 48-7-2 are not relevant for duress because no state official would act so "unreasonably or in bad faith" towards a taxpayer "with a bona fide dispute." (Reply Brief p. 9). This ignores at least one reported Georgia decision where this very conduct took place. *Wright v. Forester,* 192 Ga. 864, 16 S.E.2d 873 (1941).

The State also claims the 25% penalty is not duress because the Revenue Commissioner "may waive" any penalty if "he reasonably determines" that the default was "reasonable." O.C.G.A. § 48-2-43. Petitioner and many other retirees have received a Notice of Assessment that threatens the imposition of penalties.

[2] The Georgia Supreme Court was so concerned about the existence of a remedy that it felt compelled to create a new one (pay under protest) when it decided the case below.

refund remedy after the time had run for any other relief. The State simply ignores these facts in its reply brief. It writes about a case that does not exist and is not before this Court.

The State does not satisfy due process when it creates an illusory remedy, suckers its citizens into following this remedy, then yanks this remedy away and tells its citizens that the time has run for any other remedies. For the foregoing reasons, Petitioner respectfully requests that his Petition for Writ of Certiorari be granted.

Respectfully submitted,

CARLTON M. HENSON
McALPIN, HENSON & KEARNS
Eleven Piedmont Ctr., Ste. 400
3495 Piedmont Road, N.E.
Atlanta, Georgia 30305
(404) 239-0774